

LIBELED: 6-6-61, S. Dist. Ohio.

CHARGE: 402(a)(3)—contained insects, insect larvae, and insect parts when shipped.

DISPOSITION: 6-26-61. Default—destruction.

27336. Canned cut green beans. (F.D.C. No. 45360. S. No. 6-048 R.)

QUANTITY: 597 cases, 12 1-lb. 12-oz. cans each, at Baltimore, Md.

SHIPPED: 11-30-60, from Milton, Del., by Draper-King Cole, Inc.

LABEL IN PART: (Can) "Family Brand Cut Green Beans * * * Distributed by D. E. Foote & Co., Incorporated Baltimore, Maryland."

LIBELED: 1-23-61, Dist. Md.

CHARGE: 403(h)(1)—when shipped, the article fell below the standard of quality prescribed for canned cut green beans, since the trimmed pods of the article contained more than 25 percent by weight of seed and pieces of seed; and the deseeded pods contained more than 0.15 percent by weight of fibrous material, and its label failed to bear, as required by regulations, a statement that it fell below such standard.

DISPOSITION: 3-3-61. Consent—claimed by Draper-King Cole, Inc., and relabeled.

27337. Soybeans. (F.D.C. No. 45647. S. No. 50-083 R.)

QUANTITY: 77 100-lb. bags at Denver, Colo., in possession of Kojima Soybean Food.

SHIPPED: 1-11-60, from Stuttgart, Ark.

LIBELED: 4-28-61, Dist. Colo.

CHARGE: 402(a)(4)—held under insanitary conditions.

DISPOSITION: 6-6-61. Default—delivered to a public institution for use as animal feed.

27338. Lettuce. (F.D.C. No. 45799. S. No. 66-947 R.)

QUANTITY: 500 ctns., 24 heads of lettuce each, at East Peoria, Ill.

SHIPPED: 4-26-61, from Uvalde, Tex., by Cargil Produce Co.

LABEL IN PART: (Ctn.) "Lettuce C-RO Cargil Produce Co., Uvalde, Texas, U.S.A."

LIBELED: 5-15-61, S. Dist. Ill.

CHARGE: 402(a)(2)(B)—the article was a raw agricultural commodity and, when shipped, contained a pesticide chemical, namely, toxaphene, which is unsafe within the meaning of 408 since the quantity of such pesticide chemical on the article was not within the limits of the tolerance prescribed by regulations.

DISPOSITION: 5-31-61. Default—destruction.

NUTS AND NUT PRODUCTS

27339. Brazil nuts and mixed nuts. (F.D.C. No. 42540. S. Nos. 1-127/8 P, 44-216 P.)

QUANTITY: 178 cases, 24 1-lb. boxes each, and 50 cases, 12 2-lb. bags each, of brazil nuts; and 37 cases, 12 2-lb. bags each, of mixed nuts, at East Point, Ga.

SHIPPED: 10-31-58, from Chicago, Ill., by Robert L. Berner Co.

LABEL IN PART: (Box or bag) "Holiday Brand Extra Fancy Nuts * * * Packed by Robert L. Berner Co., Chicago, Ill."

LIBELED: 12-1-58, N. Dist. Ga.

CHARGE: 402(a)(3)—when shipped, all lots contained decomposed nuts and the mixed nuts also contained insects.

DISPOSITION: 178-case lot of brazil nuts. 1-14-59. Consent—claimed by Robert L. Berner Co. Segregation was unsuccessful and the lot was destroyed.

50-case lot of brazil nuts. 10-21-59. Consent—destruction.

37-case lot of mixed nuts. Robert L. Berner Co. appeared as claimant and filed an answer denying that the article was adulterated. The matter came on for trial before the court without a jury on 8-26-60, and at its conclusion the court took the matter under advisement for review of the record and consideration of the briefs and arguments of counsel. On 1-25-61, the court handed down the following opinion:

HOOPER, *District Judge:*

STATEMENT OF THE CASE

"In this Libel of Information the Government seeks to condemn some 178 cases of nuts, concerning which stipulation has been made between the parties. It also covers 37 cases of mixed nuts, each containing 12 bags, allegedly shipped in violation of 21 U.S.C.A., § 342(a)(3). That statute reads in effect that condemnation of food is required, and said food is adulterated 'if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food'. The evidence of insect manifestation shows such a slight amount that it may be disregarded in this discussion. The primary question is whether or not under the evidence the mixed nuts in the 37 cases are adulterated by virtue of decomposition. Also to be considered is the question whether or not a printed circular issued by the Department of Health would have the effect of relieving claimant if the goods are otherwise entitled to condemnation.

"(1) Three tests were made concerning 37 cases of mixed nuts, one lot of 18 and another lot of 12 cases. From each case there were taken 2 bags of nuts, each case containing 12 bags. The analysis showed that the nuts correspond to the amount of decomposition as shown below:

TEST BY THE GOVERNMENT OF 18 CASES NOVEMBER 14, 1958.

WALNUTS		100
	20 in some manner decomposed	
	1 insect infested	
	21% bad nuts	
ALMONDS		150
	4 decomposed	
	3 insect infested	
	6 shriveled	
	8.7% bad nuts	
PECANS		300
	24 decomposed	
	8% bad nuts	
FILBERTS		100
	2 blanks	
	2% bad nuts	
BRAZIL NUTS		500
	45 decomposed	
	1 live insect infestation	
	9% bad nuts	

TEST BY THE GOVERNMENT OF 12 CASES
MAY 14, 1959

BRAZIL NUTS		100
	4 decomposed	
	4% bad nuts	
ALMONDS		200
	3 decomposed	
	2 insect infestation	
	2½% bad nuts	
FILBERTS		100
	4 insect infestation	
	4% bad nuts	
WALNUTS		254
	15 decomposed	
	1 insect infestation	
	6.2% bad nuts	
PECANS		100
	2 decomposed	
	2% bad nuts	

TEST OF 12 CASES BY ROBERT L. BERNER CO.
FEBRUARY 12, 1959

ALMONDS		219
	3 faulty	
PECANS		106
	5 faulty	
BRAZIL NUTS		169
	13 faulty	
FILBERTS		197
	5 faulty	

"(2) This Court is ruling that the extent of decomposition shown as to each of the nuts is sufficient to demand a judgment of condemnation and is not so inconsequential as to require otherwise. The provisions of the statute in question have been strictly construed and it is not necessary for the Secretary to fix tolerances under 21 U.S.C.A., § 342(a) (3) relating to decomposition. See *United States vs. 449 Cases Tomato Paste*, 212 F. 2d 567; *Bruce's Juices vs. United States*, 194 F. 2d 935; *United States vs. Commercial Creamery Co.*, 43 F. Supp., 714.

"Claimant, however, contends that it is the duty of the Secretary to fix a tolerance regulating the food products herein involved (his contention that regulations have been issued therefor will be subsequently discussed herein). It should be noted, however, that the statute in question reads as follows:

'Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container.' 21 U.S.C.A., § 341.

"To support his contention that the fixing of standards of tolerance are mandatory claimant cites *United States vs. 1500 Cases More or Less, of Tomato Paste*, 236 F. 2d 208 (7 Cir.). It does appear in that case that the Secretary with the consent of the industry involved did fix a tolerance of forty per cent for tomatoes, to be determined under the Howard Mold Count, and the court sustained a judgment of the trial court condemning the tomatoes wherein the mold exceeded said forty per cent, and reversing the judgment of the trial court releasing other tomatoes where the count exceeded said forty per cent. The court adopted the standard of forty per cent, stating as follows:

'The Government and the canning industry must have taken into consideration the margin of error inherent in the Howard Mold Count system when they set 40 per cent as the tolerance. Any deviation from that figure on our part would be purely arbitrary without any evidence that error was more likely in one direction than the other.'

The court also stated:

'The spirit of 21 U.S.C.A. §§ 346 and 346a demands that we give effect to what reasonable standards have been set by the Food and Drug Administration in the area involved in this case, and determine them as best we can where they have not yet been established.'

"This would negate any implication that the standards must be set by the Administration as to adulteration through decomposition under 21 U.S.C.A., § 342 (a) (3) with which the court was there dealing.

"(3) Defendant has introduced in evidence a publication by Food and Drug Administration (1958 Revision) entitled 'Requirements of the United States Food, Drug and Cosmetic Act, A Guide for Foreign Manufacturers and Shippers.' It does not upon its face purport to be a regulation, nor does it appear it was adopted pursuant to law after notice was given to the industry involved. See *Dyestuffs and Chemicals, Inc., vs. Flemming*, 271 F. 2d 281, and *Federal Security Administrator vs. Quaker Oats Co.*, 318 U.S. 218. It is therefore not controlling in this case as an administrative determination of standard of quality concerning the relative amount of decomposition under 21 U.S.C.A., § 342 (a) (3).

"It is of course always to be regretted if any administrative agency puts out any publication which might lead the industry to believe that a certain amount of tolerance will be permitted and then bring proceedings for condemnation for failure to comply with the strict terms of the statute. No express estoppel upon the part of the Food and Drug Administration is contended for and the question of estoppel is not before the Court. Several things concerning the publication however, should be noted:

"(a) The publication is entitled 'A Guide for Foreign Manufacturers and Shippers.' It will be noted that regulations of imports and exports are covered by Sub-chapter VIII of the Federal Food, Drug and Cosmetic Act commencing with 21 U.S.C.A., § 381.

"(b) It should also be noted that the publication in question under the title 'Tolerances for Filth' beginning on page 5 contains the following language:

'The act does not authorize "tolerances" for filth or decomposition in foods. It states that a food is adulterated if it consists *in whole or in part* of a filthy, putrid, or decomposed substance.' (Italics contained in said text)

"Under the title 'Nuts and Nut Products' beginning on page 26 appears the following:

'While no "tolerances" for the above-mentioned defects are provided for by the Food, Drug, and Cosmetic Act, it has been well demonstrated that nuts in the shell should not contain over 10 percent by count of all such defects, and shelled nuts (nut meats) not over 5 percent. Deliberate mixing of good and bad lots to result in defects just under these figures is a basis for refusal of entry even though the percentage of defects in the mixed lots is under the above figures.'

"This Court is at a loss to understand why the department in question should in one instance emphasize the fact that no tolerances are allowed in cases of decomposition, and then subsequently in the same publication, in referring to all defects, make the statement

'that nuts in the shell should not contain over ten percent by count of all such defects and shelled nuts (nut meats) over five percent.'

While there is nothing in the instant case to show that this claimant was misled by the last quoted language, it cannot be said that Foreign Manufacturers and Shippers might not take the language to indicate a standard which is different from the standard set up in 21 U.S.C.A., § 342(a) (3), as construed by the courts.

"In addition to the right in his discretion to provide by regulations for tolerances the Secretary of Health, Education, and Welfare is given a discretion in the institution of libel and other proceedings, it being provided that nothing in the act

'shall be construed as requiring the Secretary to report for prosecution or for the institution of libel or injunction proceedings, minor viola-

tions of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or warning.' 21 U.S.C.A., § 336.

"The portion of the publication in question, apparently referring to a possible ten percent tolerance in the case of nuts in the shell might possibly be taken as an expression of intention by the Secretary to exercise his discretion pursuant to the statute just quoted. In the instant case, however, the publication in question does not affect the decision.

"The Government within twenty days hereof shall present to the Court an order in accordance herewith."

On 3-9-61, the court entered a decree of condemnation; ordered the recovery from the claimant of court costs, expenses and storage charges; and ordered the destruction of the article.

27340. Shelled peanuts. (F.D.C. No. 45188. S. No. 31-845 R.)

QUANTITY: 296 125-lb. bags at Houston, Tex.

SHIPPED: 11-17-60, from Houston, Tex., to Dothan, Ala., and returned to Houston, Tex., on 12-8-60.

LIBELED: 12-15-60, S. Dist. Tex.

CHARGE: 402(a)(3)—contained insects and insect fragments while held for sale.

DISPOSITION: 5-29-61. Consent—claimed by Hou-Tex Peanut Co., Houston, Tex., and converted into animal feed.

27341. Shelled Spanish peanuts. (F.D.C. No. 45056. S. No. 37-067 R.)

QUANTITY: 35 124-lb. bags at Philadelphia, Pa.

SHIPPED: 8-30-60, from Moultrie, Ga.

LIBELED: 10-21-60, E. Dist. Pa.

CHARGE: 402(a)(3)—contained insects while held for sale.

DISPOSITION: 5-9-61. Consent—claimed by Heidelberger Confectionery Co., Philadelphia, Pa., and denatured for seed purposes.

27342. Shelled pecans. (F.D.C. No. 45595. S. Nos. 54-785/6 R.)

QUANTITY: 113 30-lb. cases at St. Louis, Mo.

SHIPPED: 1-23-61, from Searcy, Ark., by Thompson Co.

LABEL IN PART: (Case) "Thompson's * * * Pecans Large [or "Medium Cut" or "Bakers Mixed"] Pieces * * * Packed by the Thompson Co. Searcy, Ark."

LIBELED: 3-22-61, E. Dist. Mo.

CHARGE: 402(a)(3)—contained *E. coli*; and 402(a)(4)—prepared and packed under insanitary conditions.

DISPOSITION: 4-27-61. Consent—claimed by Thompson Co., and reconditioned by placing in a chlorine solution, washing, and drying.

27343. Unshelled filberts (3 seizure actions). (F.D.C. Nos. 45155, 45156, 45157. S. Nos. 12-937 R, 13-013/4 R.)

QUANTITY: 76 cases, 24 1-lb. bags each, at Sheboygan, Wis.; and 403 cases, 24 1-lb. bags each, at Milwaukee, Wis.

SHIPPED: 10-29-60, from Portland, Oreg., by Hudson House, Inc.

LABEL IN PART: (Bag) "Pride of Oregon Brand Large Filberts * * * Packed by Hudson House, Inc., Portland, Ore."

LIBELED: 11-22-60, E. Dist. Wis.